

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



*with affidavit*

# 75-6050

To be argued by  
MEL P. BARKAN

## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6050

ARTHUR N. ECONOMOU, *et al.*,  
*Plaintiffs-Appellants,*  
—against—

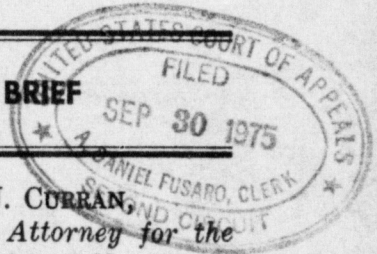
UNITED STATES DEPARTMENT OF  
AGRICULTURE, *et al.*,  
*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

### DEFENDANTS-APPELLEES' BRIEF

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Docket No. 75-6050

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*Plaintiffs-Appellants*,  
—against—

UNITED STATES DEPARTMENT OF  
AGRICULTURE, *et al.*,  
*Defendants-Appellees*.

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### DEFENDANTS-APPELLEES' BRIEF

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#### Statement of the Issue

Whether the District Court properly granted the defendants' motion to dismiss the Second Amended Complaint on the ground that it was barred by the doctrine of official immunity as to the individual defendants and by the doctrine of sovereign immunity as to the government agency defendants?

#### Procedural History

Following a Commodity Exchange Authority (CEA) audit in late 1969 of the books of plaintiffs Arthur N. Economou and his commodities trading company, Arthur N. Economou & Co., Inc. (collectively described herein as

"Economou"), the Secretary of Agriculture on February 19, 1970, issued an administrative complaint alleging that Economou wilfully failed to maintain the prescribed minimum capital balance. Upon the filing of the administrative complaint (CEA Docket No. 167), the Department of Agriculture made available copies of the Administrative Complaint in the Department's Press Room in accordance with its standard procedure when administrative complaints are issued. In accordance with that standard practice a one-page cover sheet was attached to the copies (8a; Decision of Judicial Officer, p. 162)\* which provided in pertinent part as follows:

"The complaint charges that during the period from March 31 through June 30, 1969, while a registered futures commission merchant under the Act, the respondent corporation failed to meet minimum financial requirements prescribed for futures commission merchants.

"The issuance of a complaint under the Commodity Exchange Act does not constitute proof of violation of law. Such violation is established only when the Judicial Officer of the Department has made a determination that the evidence substantiates allegations in the complaint."

Economou was directed to show cause why his registration should not be revoked and was granted two extensions of time in which to answer. In mid-1970, the CEA conducted a second audit and the Secretary issued an amended complaint on June 22, 1970.

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\* References followed by "a" are to Addendum which immediately follows this brief. The cover sheet (8a) was submitted to Judge MacMahon as was the Judicial Officer's Decision in support of the defendants' motion to dismiss.

Copies of the amended complaint were made available to the Press Room but the Department was not able to determine whether there was any cover sheet that was prepared for the Amended Complaint or whether one was attached to the copies of the Amended Complaint when they were made available in the Press Room (9a).<sup>\*</sup> A hearing was held in New York City on August 5, 6, 7 and 10, 1970 before the chief hearing officer for the Department of Agriculture. Economou, appearing without counsel, presented his case and cross-examined the Government's witnesses. Proposed findings and briefs were submitted on March 8, 1971. On August 17, 1971, the hearing officer issued a report adverse to Economou and forwarded the record to the Secretary of Agriculture. Economou took exception to the report and requested oral argument before the Secretary. The matter was pending before the Agriculture Department's Judicial Officer when Economou filed *pro se* his initial 102-page complaint in the United States District Court for the Southern District of New York. The initial complaint alleged among numerous other things that Economou's violations, if any, were not wilful and therefore he had not received the required informal notice and an opportunity to correct the violations before the institution of CEA Docket No. 167; that the proceeding should have been terminated since Economou was no longer engaging in the regulated activity; and that false press releases had been issued relating to CEA Docket No. 167. These are the same issues raised in all three of Economou's complaints in the District Court and the only ones raised in the second amended complaint. The Complaint also

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<sup>\*</sup> A copy of the CEA Response to Item 13, Judicial Officer's "Questions for Oral Argument" in Docket No. 167 (9a) was submitted to Judge MacMahon in support of Defendants' motion. That document has been in Economou's possession for approximately three years.

asked for \$32,000,000 damages against the defendants who were as follows:

1. United States Department of Agriculture.
2. Earl L. Butz, Secretary of Agriculture.\*
3. Richard T. Lyng, Assistant Secretary of Agriculture.
4. Commodity Exchange Authority.
5. Alex C. Caldwell, Acting Administrator of CEA.
6. Charles E. Robinson, Director, Compliance Division of CEA.
7. Richard E. Kirchhoff, Deputy Director, Registration and Audit Division of CEA.
8. Jack W. Bain, Chief Hearing Examiner of the U.S. Department of Agriculture.
9. Richard W. Davis, Jr., Counsel for the U.S. Department of Agriculture.
10. T. Reed McMinn, Regional Administrator, New York Regional Office of CEA.
11. Clement Gross, an Auditor of CEA.
12. Murray A. Wolkis, an Auditor of CEA.
13. Edward F. Fitzpatrick, an Auditor of CEA.

On the day after filing his complaint, Economou filed an Order To Show Cause why a preliminary injunction should not be granted restraining the continuation of the CEA enforcement proceeding (No. 167) against him for the reasons outlined in the Complaint.

After the defendants had filed their answer to the initial complaint and an affidavit in opposition to the motion for an injunction had raised as two defenses the doctrines of official and sovereign immunity, the District

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\* It is submitted that in no event may the second amended complaint stand against Secretary Butz since he had no personal participation in CEA Docket No. 167 (See Davis Aff. ¶ 4 submitted in opposition to first motion for a preliminary injunction (14a)).

Court in a Memorandum and Order filed on April 20, 1972, denied the plaintiffs' motion for a preliminary injunction (1a-7a).<sup>\*</sup> Economou applied to both the District Court and the Court of Appeals for a stay of the administrative proceedings pending appeal and the motion was denied by both courts. Economou never prosecuted that appeal and it was dismissed.

In the meantime the administrative enforcement proceeding continued and in December 1972, Economou moved in the District Court for leave to file his first amended complaint. The motion was granted upon the consent of the defendants. The first amended complaint was the same as the initial complaint but additionally alleged that the Judicial Officer, who had permitted Economou approximately 6 months in adjournments would not permit him any more time to respond to his proposed decision, and thus had joined the general CEA and U.S.D.A. conspiracy to deprive him of his constitutional and civil rights.

Eleven days later, on December 29, 1972, Economou made a second motion for a preliminary injunction to restrain the enforcement proceeding which was then on the brink of a decision by the Judicial Officer. That decision, if adverse to plaintiffs, would be immediately appealable under the Commodity Exchange Act to the Court of Appeals. 7 U.S.C. § 9. The District Court again denied the request for preliminary injunction on January 5, 1973 (20a-21a). Economou filed another Notice of Appeal but never prosecuted it and it was eventually dismissed.

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<sup>\*</sup> The affidavit of defendant Richard W. Davis (10a-19a) submitted to the District Court in February 1972, indicates that Davis participated extensively in CEA Docket No. 167. He outlined under oath the nature of each defendant's activities regarding the proceeding. A review of that affidavit will indicate that all of the alleged wrongful acts were within the scope of the defendants' authority and that there is no doubt that each defendant is immune.

On February 28, 1973, the defendants filed their answer to the first amended complaint again alleging as defenses sovereign and official immunity.

For the next two years Economou did absolutely nothing to prosecute this case. During the interim, on January 15, 1973, the Judicial Officer's tentative findings became final and Economou appealed the adverse decision to the Court of Appeals for the Second Circuit. On March 28, 1974, the Court of Appeals reversed the Judicial Officer's decision in the following short *per curiam* opinion:

"Petitioners, who are no longer in business as futures commission merchants under the Commodity Exchange Act seek review of a 90-day suspension order, advancing numerous grounds, including estoppel, lack of evidence of violation and of wilfulness. We need not address most of these, since it appears that the essential finding of wilfulness, now passionately protested, was made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies. Under these circumstances, the finding of wilfulness appears erroneous on the record taken as a whole, and the sanctions imposed unwarranted.

"The petition for review is granted and the order set aside."

*Arthur N. Economou and Arthur N. Economou & Co., Inc. v. U.S. Dept. Agriculture*, 494 F.2d 519 (2d Cir. 1974).

The Court of Appeals, however, according to the proposed second amended complaint (§ 12), denied Economou his costs of appealing.

Approximately a year after the Court of Appeals' Opinion was handed down, Judge MacMahon's Clerk requested a status report on this case. On March 4, 1975, the U.S. Attorney's Office wrote the following letter, a copy of which went to Mr. Economou at his home:

"This status report was requested by your Court Clerk. The above action was held in suspense pending the outcome of Mr. Economou's appeal of the Department of Agriculture's decision to sanction him and his commodities firm. Although his appeal was successful (a copy of the Second Circuit's Opinion is attached), Mr. Economou has shown no interest in continuing the above action in the year since the Court of Appeals' decision. Under the circumstances, a dismissal for lack of prosecution would seem appropriate" (22a).

Prompted only by the threat that Judge MacMahon would dismiss the case for lack of prosecution, three days later plaintiffs filed a motion for leave to file a second amended complaint. On the same day that the motion to file a second new complaint was returnable, the defendants consented to that motion and filed their own motion to dismiss the second amended complaint on the ground that it was barred on the grounds of official and sovereign immunity.\* This was also the date on which

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\* It should be noted that the second amended complaint added another Economou entity (The American Board of Trade, Inc.) as a plaintiff. Judge MacMahon disposed of this new plaintiff's frivolous claims in the first footnote of his Opinion:

"In the second amended complaint, American Board of Trade, Inc. (AMT, Inc.) appears as a plaintiff. The only reference to this plaintiff is in paragraphs 25 and 26 of the second amended complaint, wherein it is alleged that defendants' acts vis-a-vis plaintiffs ANE and ANE, Inc. caused AMT, Inc. emotional burdens and resulted in trespass on its land. These vague and conclusory allegations

[Footnote continued on following page]

Economou served the interrogatories which he alludes to in his brief as having not been answered.\*

Shortly thereafter, the District Court granted the defendants' motion to dismiss. Economou now appeals. (Within the last month Economou's American Board of Trade, Inc. has sued the Commodity Futures Trading Commission, the successor to the CEA, and a number of its officers (different from the individual defendants herein), as well as the Department of Agriculture and the United States for the more modest sum of \$150,000 for apparently continuing the governmental conspiracy against him. *American Board of Trade, Inc. v. William T. Bagley, et al.*, 75 Civ. 4223 (HFW) (S.D.N.Y.)).

### **The Second Amended Complaint**

Although there are ten alleged causes of action and although Economou argues that the District Court oversimplified the allegations of the second Amended Complaint, it does not alter the fact that there appears to be only three sets of operative facts alleged which supposedly

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completely fail to establish a causal link between defendants' acts and the alleged harm to AMT, Inc. We, therefore, grant defendants' Rule 12(b) motion as to AMT, Inc. and reference to "plaintiffs" in the test will mean ANE and ANE, Inc. only."

Additionally, we believe that our arguments regarding official and sovereign immunity are equally applicable to the "claims" of this new plaintiff.

\* Despite the numerous protestations to the contrary in appellants' brief, this case has not been prosecuted diligently. It's procedural history before the administrative agency and in the courts is not irrelevant when coupled with the essentially frivolous and retaliatory nature of the claims alleged for which plaintiffs seek \$32,000,000 in damages against federal regulatory officials who were doing nothing but their jobs.

give rise to the huge claim of personal liability by government officials. These operative factual allegations are as follows:

- 1) plaintiffs were not given the notice or warning required by law (§ 13);
- 2) plaintiffs were subjected to the administrative proceeding despite the fact they were going out of business and thus leaving CEA jurisdiction (§§ 14, 15, 17 and 21);
- 3) defendants publicized the complaint and issued inaccurate press releases (§§ 16, 19, 20, 23 and 24).

In each paragraph, plaintiffs characterize these acts as "ministerial" or "not discretionary" and allege that they violated various constitutional and civil rights and were accompanied by "malice" apparently because Mr. Economou had been "sharply critical of the staff and operations of defendants and carried on a vociferous campaign for the reform of defendant Commodity Exchange Authority to obtain more effective regulation of commodity trading" and the acts were thus alleged to be outside the scope of the defendants' authority (§ 6).\*

### **The Opinion Below**

Despite the contention by appellants that the District Court prematurely decided to dismiss the second amended complaint and that they should have been permitted a chance to factually substantiate their allegations, the Dis-

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\* We believe that characterizations as "ministerial" or "discretionary" or "outside the scope of authority" are legal conclusions for the Court and that plaintiffs' characterizations are erroneous as a matter of law.

strict Court (as required by a Rule 12(b) motion) presumed the facts as alleged to be true. The complaint was dismissed on the ground that even if Economou proved everything he alleged, he must lose since prior case law precluded him from recovering for the three specific wrongs he alleged in his complaint.\* It thus was presumed that malice accompanied the agency's decisions to institute enforcement proceedings in the manner it did and to continue the proceeding after Economou ceased doing regulated business and that upon filing the administrative complaints, inaccurate press releases were issued.

Judge MacMahon held that whether an agency charged with enforcing a specific regulatory statute alleges that a specific violator has been wilful (and thus disentitled to prior informal notice and an opportunity to correct his violations) is a discretionary decision based upon all the evidence and that such a decision must be given immunity similar to the immunity given to the discretionary decisions permitted a criminal prosecutor.

Similarly, Judge MacMahon held that an agency's decision to interpret its statute in order to continue enforcement proceedings against an alleged violator who has since discontinued the regulated business has been recognized by this Circuit as a legitimate agency interpretation of its own authority. He also held that the issuance of press releases, even if false, in connection

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\* We believe that even so, at this stage in the proceedings (Judge MacMahon had denied two preliminary injunctions, had before him an affidavit relating to the defense of official immunity, the Judicial Officer's decision and the Court of Appeals' reversal as well as information concerning the alleged false press releases) where Economou's recent activity was prompted by the threat of dismissal for lack of prosecution, that Judge MacMahon properly could have treated the motion as one for summary judgment.

with an enforcement proceeding was immune under a recent case in the Supreme Court which involved the issuance of press releases.

## ARGUMENT

### The District Court Properly Dismissed the Complaint.

#### I. Official Immunity

##### A. General Principles

In considering the problem of public officials' liability, there exists a conflict between public policy considerations. On the one hand there is the protection of the individual citizen against oppressive official action, and on the other hand, there is the protection of the people by shielding officers against vindictive and retaliatory damage suits in order to insure their fearless and effective administration of the law. See *Galella v. Onassis*, 487 F.2d 986, 993-94 (2d Cir. 1973); *Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir. 1938); Note, 38 *Mich. L. Rev.* 1344 (1940). The factors to be considered, as did the District Court in the instant case, in a determination of whether or not an official has immunity are: (1) whether or not the official was acting within his scope of his authority; and (2) if the official was acting within his scope of authority, whether the act was "discretionary" or "ministerial". See *Galella v. Onassis*, *supra*; *Wm. Prosser, Law of Torts*, pp. 1013-1019 (3d ed. 1964); K. Davis, "Administrative Officers' Tort Liability", 55 *Mich. L. Rev.* 201 (1956).

The federal courts have interpreted "outside the scope of authority" to mean clear absence of all jurisdiction over the subject matter. *Bradley v. Fischer*, 80 U.S. (13 Wall.) 335 (1872) (judges); *Spalding v. Vilas*, 161 U.S. 483 (1896) (Postmaster General). To be within the

scope of authority it is sufficient if the act is done by an officer *in relation* to matters committed by law to his control or supervision, *Standard Nut Margarine Co. v. Mellon*, 72 F.2d 557, 559 (D.C. Cir. 1934), *cert. denied*, 293 U.S. 605 (1934); or have more or less connection with the general matters committed by law to his control or supervision, *Spalding v. Vilas*, *supra*.

In *Barr v. Matteo*, 360 U.S. 564 (1959) it was held that if the official acted within the "outer limits" of his duties, he will be immune from suit. The mere fact that the officers act with personal malice will not take the act outside the scope of authority. *Id.*

See also, *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) (action for false imprisonment against Attorneys General, District Directors of Enemy Alien Control Division and District Director of Immigration). Judge Learned Hand expounded the rationale by stating:

"What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him."

*Id.* at 581.

Although the general rule recognizes the distinction between "ministerial" and "discretionary" acts, this Circuit has recognized that such a litmus paper test concerning the applicability of official immunity is neither necessary nor productive since it merely postpones the value judgment which must be made—"is the act complained of the result of a judgment or decision which it is necessary that the government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?" *Ove Gustavsson Contracting*

*Co. v. Floete*, 299 F.2d 655, 659 (2d Cir. 1962).<sup>\*</sup> In that case it was held that government contract compliance officers must be free to report contract non-compliance and to act on such reports without fear for personal liability. We believe no less protection should be afforded administrative investigators, prosecutors and judges who are performing their functions in an industry regulated by Congress. Any threat of personal liability for performing their normal functions and making routine decisions would impair the congressional desire for regulation and would not be in the public interest.

With this seeming distrust of the distinction between "ministerial" acts and "discretionary" acts this court in *Ove Gustavsson* held that the same policies governing immunity should be applied, contrary to appellants' contentions in the instant case to officials of "less than high rank in the hierarchy of officialdom" . . . *Id.* See also *Peterson v. Weinberger*, 508 F.2d 45, 50-51 (5th Cir. 1975) (regional staff investigators administering Medicare for HEW's Bureau of Health Insurance).

Thus, if a government official is acting within the outer limits of his specific statutory authority, if some judgment is involved, he will be immune from personal liability. See *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973). Some distinction should be made between the alleged constitutional torts of police officers with their powers to arrest and search and other governmental officers who do not possess such potential for abuse regarding a citizen's personal liberty and safety. In the case of police officers performing their general functions, the courts historically have been less willing to extend the doctrine of official immunity. Compare *Bivens v. Six Unknown Named Agents of the Federal Bureau of*

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<sup>\*</sup> See also *United States ex rel. Fear v. Rundle*, 506 F.2d 331, 335 n. 4 (3d Cir. 1974).

*Narcotics*, 456 F.2d 1339 (2d Cir. 1972) with *Galella v. Onassis*, *supra*, at 994, n. 9:

"However, the duty of protecting the personages singled out by Congress as in need of this extraordinary shield from likely harm is *toto coelo* different from the normal police function of arrest for law violation on warrant or on probable cause as in *Bivens*."

Similarly, here where Congress has chosen a specific industry to regulate, and has allocated money and personnel to form an agency for its specific regulation, cases which involve the normal police functions cannot be cited to limit immunity which appears essential to protect the functioning of that agency from retributive and vexatious lawsuits based upon cries of "malice", "falsity" and "conspiracy".

Thus, *Scheuer v. Rhodes*, 416 U.S. 232 (1974) frequently cited by appellants is distinguishable from the case at bar since it involved essentially general police functions by the Ohio National Guard resulting in the unfortunate death of student demonstrators. *Scheuer* arose under 42 U.S.C. § 1983 which by its own terms is a substantial disavowal of a state official's right to claim immunity. It did not involve the question of immunity for federal regulatory officials who are accused of constitutionally frivolous torts for routine activities clearly within the scope of their authority.\*

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\* *Doe v. McMillan*, 412 U.S. 306 (1972), cited by appellants throughout their brief is even less applicable than *Scheuer* since it involves the scope of legislative immunity under the speech and debate clause. It has virtually nothing to do with the common law notion of executive immunity.

Once it has been determined that the official acted within the outer limit of his authority, despite the fact that the distinction has been questioned, consideration must be given as to whether the act was "ministerial" or "discretionary." The general rule is that if the act is discretionary, the officer is not liable regardless of whether he was motivated by malice. *Barr v. Matteo, supra*.

An act can be considered "ministerial" when it is positively commanded by law, and its performance is so plainly described as to be free from doubt. See *Richardson v. United States*, 465 F.2d 844 (3d Cir. 1972), *rev'd on other grounds*, 418 U.S. 166 (1974); *United States v. Walker*, 409 F.2d 477 (9th Cir. 1969); *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d 364 (10th Cir. 1966), *cert. denied*, 385 U.S. 831 (1966); *Fifth Avenue Peace Parade Committee v. Hoover*, 327 F. Supp. 238 (S.D.N.Y. 1971); *Guffanti v. Hershey*, 296 F. Supp. 553 (S.D.N.Y. 1969).\*

An act can be considered "discretionary" if it requires personal deliberation, decision and judgment. *Wm. Prosser, Law of Torts, supra*, at 1015. Some examples of "discretionary" acts: the issuance of a press release by Acting Director of Rent Stabilization Board, *Barr v.*

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\* Appellants cite a number of cases (Br. pp. 14-15) interpreting the discretionary function exception to the Federal Tort Claims Act. 28 U.S.C. § 2680(a). Without unduly elaborating, we believe that any analysis for the purpose of an individual official's immunity ought to be coincident with the analysis for the issuance of a writ of mandamus which requires a finding that he clearly abused his authority. We believe that if a writ of mandamus would not issue a federal official should not be held personally liable. The "deep pocket" notion which might be more applicable if the Government itself was a defendant under the Tort Claims Act should not be applied here.

*Matteo, supra*; statement by HEW claims representative in a confidential internal report, *Poss v. Lieberman*, 299 F.2d 358 (2d Cir. 1949); reports filed by government officials concerning performance on government contracts, *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963); statements made by director of maintenance control program at a Navy base during grievance proceedings, *Preble v. Johnson*, 275 F.2d 275 (10th Cir. 1960).

Therefore, a public official will not in any event be liable for a wrongful act provided it is "discretionary" and performed within the outer limits of his authority or if it is determined that the act is the type of routine decision which federal regulatory officials ought, in the public interest, be free to make without fear from potential liability.

## **B. The Alleged Lack of Notice**

The District Court recognized when it denied Economou's first motion for a preliminary injunction that "The Secretary's decision to issue an order is discretionary and requires the application of expertise" (6a). The District Court also recognized that there can be no doubt that the CEA had authority under sections 9 and 12 of the Commodity Exchange Act to institute an enforcement proceeding against a commission merchant registered under the Act after first investigating the financial condition of that commission merchant.

In the instant case Economou was charged (although perhaps erroneously in light of the Court of Appeals' decision) with "*wilful*" violation of the capital requirements of the Commodity Exchange Act. Whether or not a violation is wilful usually will be determined by inference from circumstantial evidence. Whether to charge

someone with a wilful or non-wilful violation rests as much in the discretion of the Secretary or his delegates as does the decision to initiate an action. Much the same decision must be made by any prosecutor in determining whether to charge a person and, if so, precisely what violation he should be charged with and how an indictment or complaint should be phrased given the unique facts of the case.\*

Here, the charge of wilfulness was included. As a result Economou was not entitled to prior written notice of the alleged violation according to CEA Rule 0.3(c) which reads:

(c) *Who may institute.* If, after investigation of the matters complained of in the application described in paragraph (a) of this section, or after investigation made on his own motion, the Secretary "has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of the Act, or any of the rules and regulations made pursuant to its requirements, or has manipulated or is attempting

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\* It is well settled that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General. *Powell v. Katzenbach*, 350 F.2d 235 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *Milliken v. Stone*, 16 F.2d 981 (2d Cir.), *cert. denied*, 274 U.S. 748, 47 S. Ct. 764, 71 L.Ed. 1331 (1927); *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961); *Smith v. United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841, 88 S. Ct. 76, 19 L.Ed. 2d 106 (1967). See also *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 19 L.Ed. 196 (1868); *Goldberg v. Hoffman*, 225 F.2d 463 (7th Cir. 1955); *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied sub nom., Cox v. Hauberg*, 381 U.S. 935, 85 S. Ct. 1767, 14 L.Ed. 2d 700 (1965); *Newman v. United States*, 127 U.S.App.D.C. 263, 382 F.2d 479 (1967); *Moses v. Kennedp*, 219 F. Supp. 762, 764-765 (D.D.C. 1963); *Peek v. Mitchell*, 419 F.2d 575 577-578 (6th Cir. 1970).

to manipulate the market price of any commodity, in interstate commerce, or for future deliver on or subject to the rules of any board of trade," he will institute a proceeding: *Provided*, That in any case, *except one of wilfulness* or one in which the public health, interest or safety otherwise requires, prior to the institution of a proceeding for the suspension or revocation of a registration or license, facts or conditions which may warrant such action shall be called, in writing, to the attention of the person concerned against, and such person shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Proceedings will be instituted only upon complaints filed by the Secretary and will not be initiated upon pleadings filed by private person (emphasis added).

See also, 5 U.S.C. § 558(c) which also exempts wilful violations from those which would require prior informal notice and an opportunity for correction.

Whether or not Economou was to receive prior written notice of the alleged violations prior to the institution of the complaint against him was as much a discretionary act as determining whether to file the complaint in the first place. The type of notice to which Economou was entitled flowed from the discretionary decision of whether or not he should be charged with wilful violations. That this discretion was properly (although perhaps erroneously) exercised was indicated by the decisions of both the Hearing Examiner and the Judicial Officer that the violations were in fact wilful.\* Also,

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\*It is respectfully submitted that the Administrative judges—first the hearing examiner (defendant Bain) and then the Judicial Officer (defendant Campbell) ought to be absolutely immune, in any event, as Judges—although administrative ones. See *Pierson v. Ray*, 386 U.S. 547 (1967).

the fact that in varying contexts "wilfulness" may take on a variety of meanings and that there is frequently no certainty in the ultimate definition or standard that will be applied by a court is a phenomenon which should require no citation. "Wilful" means a lot less in a "responsible officer" civil tax case than in a criminal case. Indeed, the word may have different meanings depending upon the criminal statute that may be involved.

It is submitted that whether someone is charged with a "wilful" violation of a statute and the consequences (including notice) therefrom are totally discretionary and must be entitled to immunity under the previously cited case law.

### **C. Alleged Lack of Jurisdiction Due to the Resignation from Licensed Activities**

The Court of Appeals for this Circuit has ruled in cases where registrants had withdrawn or voluntarily resigned a license before administrative enforcement proceedings were commenced, that an agency proceeding is not necessarily unlawful, will not be restrained and is based upon "no more than a reasonably possible interpretation of a somewhat ambiguous statute in a manner which would most protect the class which the Commission was established to protect." *M. C. Davis & Co. v. Cohen*, 369 F.2d 360, 363 (2d Cir. 1966). See the Opinion of the Judicial Officer, pp. 195-196, and cases cited thereat.

Despite this, Economor alleges that the CEA's unanimous view that it could proceed with its enforcement action although in the middle of it Economor ceased doing a regulated business, should give rise to an action

for damages against enforcement and judicial officers who adopted that view.

It is submitted that this discretionary interpretation of the Act in aid of its purpose and for the benefit of the class it was designed to protect cannot be used to mulct governmental officials in damages. They are immune from such discretionary acts as are performed within the scope of their official duties.

#### **D. The Press Release**

Economou alleges that a press release was issued by the defendants which inaccurately described the financial condition of his company when the complaint and amended complaint were filed initiating the administrative proceeding and that he was severely damaged thereby.

However, *Barr v. Mateo*, 360 U.S. 564 (1959) specifically held that press releases issued in the course of their duties by government officials may not give rise to liability on the part of those officials. See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

"Federal officers enjoy an absolute privilege for defamatory publication within the scope of official duty regardless of the existence of malice or ill-will."

Press releases concerning the initiation of administrative enforcement proceedings have always been considered to be lawful and a discretionary function of administrative officials. See *F.T.C. v. Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308, 1312-15 (D.C. Cir. 1968). "Constitutional" attacks on such press releases have been held to be "frivolous" (*Bowman v. United States Department of Agriculture*, 363 F.2d 81, 86

(5th Cir. 1966).<sup>\*</sup> Even where police publish charges of criminal conduct although they "had concluded that the plaintiff had not in fact committed a crime", the Second Circuit has refused to find a violation of the constitutional right to privacy. See *Rosenberg v. Martin*, 478 F.2d 520, 525 (2d Cir. 1973).

Economou can obtain no relief against government officials who, in their discretion, issue press releases publicizing or summarizing administrative complaints issued to commence enforcement proceedings under the statute which they are charged with administering.

## **II. The Complaint Against the Two Government Agencies was Properly Dismissed Since it was Barred by the Doctrine of Sovereign Immunity**

The defendants, the United States Department of Agriculture and Commodity Exchange Authority, are not suable entities since they are departments or agencies of the United States which Congress has not authorized to be subject to suits in their own name and, thus, the Court has no jurisdiction as to them. See *Blackmer v. Guerre*, 342 U.S. 512 (1952). Appellants, conceding the correctness of this proposition, now lamely ask that they

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<sup>\*</sup> Indeed, the Administrative Procedure Act seems to require an agency to publicize the complaints and orders to show cause which it issues in order to keep a regulated industry abreast of enforcement proceedings. 5 U.S.C. § 552(a)(2). Thus, making available the complaint or amended complaint to the press is a virtual duty imposed by statute. It is inconceivable that personal liability should attach to government officials as a result of making it available to the press if the respondent should ultimately be cleared of the charges in such complaint.

be permitted to serve a third amended complaint in order to name the United States of America under the Federal Tort Claims Act. However, they have ignored the requirements of that Act in so doing. They have never filed the administrative claim required by the Act. 28 U.S.C. § 2675.

It is respectfully submitted that this action is the type of vindictive, retributive and constitutionally frivolous action which was properly dismissed by the District Court.

### CONCLUSION

**For the aforesaid reasons, it is respectfully requested that the judgment of the District Court dismissing the second amended complaint be affirmed in all respects.**

Dated: New York, New York  
September 25, 1975

Respectfully submitted,

PAUL J. CURRAN,  
*United States Attorney for the  
Southern District of New York,  
Attorney for Defendants-  
Appellees.*

MEL P. BARKAN,  
STEVEN GLASSMAN,  
*Assistant United States Attorneys,  
Of Counsel.*

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**ADDENDUM**

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Memorandum by MacMahon, D. J., filed April 20,  
1972, denying Economou's first Motion  
for a preliminary injunction

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Pro Se 72 Civ. 478

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ARTHUR N. ECONOMOU,

*Plaintiff,*

*—against—*

UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,  
*Defendants.*

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MACMAHON, *District Judge.*

Plaintiff, appearing pro se, moves pursuant to Rule 65, Fed. R. Civ. P., preliminarily to enjoin the Secretary of Agriculture, the Commodity Exchange Authority ("CEA") and other governmental officials and agencies from conducting further administrative disciplinary proceedings against him and the corporation which he controls, Arthur N. Economou & Co., Inc., a registered commodity commission merchant, in connection with an alleged wilful violation of commodity exchange regulations fixing minimum capitalization requirements for registered merchants.

In his underlying action, plaintiff seeks a permanent injunction restraining the government from continuing disciplinary proceedings against him, a declaratory judgment that certain regulations promulgated under the

*Memorandum by MacMahon, D. J., filed April 20,  
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Commodity Exchange Act (the "Act") are unconstitutional, a definition of "wilful" as used in the Act, and a judgment for \$32,000,000.

The Act requires a registered commission merchant to maintain a minimum capital balance in order to protect the public from sharp trading practices. 7 U.S.C. § 6f(2). A regulation promulgated by the Secretary of Agriculture provides that the required balance be an amount equal to, or in excess of, either \$10,000 or the sum of certain "safety factors" plus 5% of the merchant's aggregate indebtedness, whichever is greater. The regulation also contains comprehensive definitions of "current assets," "current liabilities," and "aggregate indebtedness" used in calculating the minimum balance. 17 C.F.R. § 1.17.

Section 9 of the Act sets forth the disciplinary machinery employed against alleged violators of the Act or the regulations. There are five steps in the process:

First, the Secretary, upon belief that any person has violated the Act or regulations, issues a complaint. If wilfulness is not alleged, or if the public health, interest or safety does not require otherwise, opportunity is given to the alleged offender to comply with the regulations.

Second, if the offender fails to comply, or if the violation is thought to be wilful, he is directed to show cause why his registration should not be revoked or suspended.

Third, an evidentiary hearing is held before a CEA referee and briefs are submitted.

*Memorandum by MacMahon, D. J., filed April 20,  
1972, denying Economou's first Motion  
for a preliminary injunction*

Fourth, the referee issues a report and transmits the hearing record to the Secretary for review and, in the discretion of the Secretary, for an order either suspending or revoking the registration.

Fifth, if an order is issued, the person named in the order may obtain judicial review in the United States Court of Appeals for the circuit in which he does business. The circuit court has jurisdiction to affirm, set aside, or modify the Secretary's order.

The essential facts underlying the motion are undisputed. Following a CEA audit of plaintiff's books, the Secretary issued a complaint on February 19, 1970 alleging that plaintiff and his corporation wilfully failed to maintain the prescribed minimum capital balance. Plaintiff was directed to show cause why his registration should not be revoked and was granted an extension of time in which to answer. Subsequently, the CEA conducted a second audit and the Secretary issued an amended complaint. A hearing was held in New York City on August 5, 6, 7, and 10, 1970 before the chief hearing officer for the Department of Agriculture. Plaintiff, appearing without counsel, presented his case and cross-examined the government's witnesses. Proposed findings and briefs were submitted on March 8, 1971 raising substantially the same issues now raised here. On August 17, 1971, the hearing officer issued a report adverse to plaintiff and forwarded the record to the Secretary of Agriculture. Plaintiff took exception to the report and requested oral argument before the Secretary. The matter is now pending before the Agriculture Department's Judicial Officer.

*Memorandum by MacMahon, D. J., filed April 20,  
1972, denying Economou's first Motion  
for a preliminary injunction*

Plaintiff makes three principal contentions with respect to the disciplinary action instituted against him: (1) that the regulation pertaining to the minimum capital balance is unconstitutionally vague; (2) that the Secretary, by charging him with a wilful violation, deprived him of the right to comply with the regulation voluntarily; and (3) that the CEA proceedings are the sham product of a conspiracy among agriculture and CEA officials to impugn his business reputation and destroy his plans for a new commodity market system in the United States. Plaintiff also maintains that as a result of the government's action, he has suffered, and continues to suffer, irreparable injury.

The government denies plaintiff's allegations, contends that the administrative action was taken within the agency's statutory authority, and urges the court to dismiss the action for failure to exhaust administrative remedies.

At least since *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Plaintiff does not dispute the fact that the Act provides an administrative remedy for persons who, like himself, have been accused by the Secretary of violating the Act. He contends, nevertheless, that under the circumstances of this case, exhaustion is not required.

Plaintiff makes three arguments to support his contention: (1) that under the recent decision in *McKart v. United States*, 395 U.S. 185 (1969), exhaustion is no longer required where a question of statutory interpreta-

*Memorandum by MacMahon, D. J., filed April 20,  
1972, denying Economou's first Motion  
for a preliminary injunction*

tion is at issue; (2) that if required to exhaust his administrative remedy he will be irreparably injured; and (3) that given the conspiratorial nature of the proceedings his administrative remedy is inadequate.

Plaintiff's reliance on *McKart* is greatly misplaced. *McKart* held that a defendant in a selective service case is not required to take an administrative appeal on a question of statutory interpretation as a prerequisite to challenging his induction order in a criminal prosecution. We observe at the outset that the CEA proceeding is not a criminal or even a quasi criminal prosecution. *Board of Trade of City of Chicago v. Wallace*, 67 F.2d 402 (7th Cir. 1933). More important, however, is the fact that *McKart* is authority for the conclusion, which we reach, that plaintiff must exhaust his administrative remedy before obtaining judicial review of his claim.

The Supreme Court taught in *McKart* that the policy underlying the doctrine is

"the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages."

*Memorandum by MacMahon, D. J., filed April 20,  
1972, denying Economou's first Motion  
for a preliminary injunction*

The Court also observed that:

"Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene."

The reasons set forth in *McKart* apply here with special force. Congress has, in the Act, reposed the power to decide whether a commodity merchant has violated provisions of the Act in the Secretary of Agriculture, at least in the first instance. Premature interruption of the administrative proceeding would plainly be at odds with that congressional regulatory scheme. Moreover, the Secretary's decision to issue an order is discretionary and requires the application of expertise. Furthermore, the autonomy of the Department of Agriculture and regularity and consistency of its policies are essential to the administration of a nationwide regulatory scheme. Finally, if plaintiff is successful in his appeal to the Secretary, the courts will ultimately avoid passing on the constitutionality of the regulations. Cf. *M. G. Davis & Co. v. Cohen*, 339 F.2d 360, 363 (2d Cir. 1966).

Plaintiff's second argument, that he will suffer irreparable injury to his business reputation and a loss of credit if required to exhaust his administrative remedy, is insufficient to override the policy behind the exhaustion doctrine. *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 539-540 (1954); *Myers v. Bethlehem Shipbuilding Corp.*, *supra*, 303 U.S. at 50-51.

*Memorandum by MacMahon, D. J., filed April 20,  
1972, denying Economou's first Motion  
for a preliminary injunction*

Plaintiff's third argument, that his administrative remedy is inadequate because on oral argument to the Department of Agriculture's Judicial Officer "the government lawyers I would be opposing know every aspect of my case and arguments while I have been kept completely in the dark about their arguments which I would be expected to rebut extemporaneously and orally," is patently insubstantial. Moreover, if plaintiff's suspicions of conspiracy have any merit, which is doubtful judging by the record before us, we are confident his rights will be vindicated on appeal to the court of appeals, as provided by the Act.

Accordingly, plaintiff's motion is denied in all respects.

The foregoing constitutes this court's findings of fact and conclusions of law, as required by Rule 52, Fed. R. Civ. P.

So ordered.

Dated: New York, N. Y.  
April 20, 1972

LLOYD F. MACMAHON  
United States District Judge

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**U.S. Department of Agriculture Coversheet outlining  
Complaint in CEA Docket No. 167 for  
Department's Press Room**

UNITED STATES DEPARTMENT OF AGRICULTURE

Commodity Exchange Authority

Washington, D. C. 20250

**ISSUANCE OF COMPLAINT—CEA Docket No. 167  
(Administrative Hearing under the Commodity  
Exchange Act)**

A complaint and notice of hearing has been signed by the Assistant Secretary of Agriculture, charging violation of the Commodity Exchange Act by:

Arthur N. Economou,  
Arthur N. Economou & Co., Inc.  
(New York, New York)

The complaint charges that during the period from March 31 through June 30, 1969, while a registered futures commission merchant under the Act, the respondent corporation failed to meet minimum financial requirements prescribed for futures commission merchants.

The issuance of a complaint under the Commodity Exchange Act does not constitute proof of violation of the law. Such violation is established only when the Judicial Officer of the Department has made a determination that the evidence substantiates allegations in the complaint. Complaints are filed in the Office of the Hearing Clerk of the Department of Agriculture and are a matter of public record. Pending disposition by the Judicial Office, it is the policy of the Commodity Exchange Authority not to comment or elaborate on charges contained in complaints or to discuss evidence on which they are based. A public hearing on the complaint is scheduled to be held before a referee at 10:00 a.m., local time, March 31, 1970, in New York, New York.

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**U.S. Department of Agriculture's "Response to Item  
13, Judicial Officer's 'Questions for Oral Agreement'"  
in CEA Docket No. 167**

UNITED STATES DEPARTMENT OF AGRICULTURE

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In re:

ARTHUR N. ECONOMOU, and ARTHUR N. ECONOMOU  
& Co., INC.,

*Respondents.*

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1. The Judicial Officer, in his "Questions for Oral Argument," served on the parties by letter dated February 18, 1972, requests in item 13, that copies of any "press releases issued by the complainant as to this proceeding" be forwarded to him and to the respondent.

2. Complainant does not consider that any "press release," as such, has been issued. What has been done is that copies of the complaint and the amended complaint were made available to the reporters using the Department of Agriculture Press Room. This is standard procedure whenever a complaint is issued. (See letter from Assistant Secretary Lyng to respondent filed herein on March 3, 1971 by respondent.) Normally, a cover sheet is attached which summarizes the allegations and explains the meaning and effect of the complaint.

3. Copies of the cover sheet for the original complaint are attached hereto. No copy of a cover sheet for the amended complaint is available. It is not now known whether such a cover sheet was attached to the amended complaint when it was placed in the Press Room.

RICHARD W. DAVIS, JR., Attorney  
Commodity Exchange Authority

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**Affidavit of Richard W. Davis, Jr., sworn to on  
February 11, 1972, in opposition to first  
Motion for a preliminary injunction**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Pro Se 72 Civ. 478

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ARTHUR N. ECONOMOU,

*Plaintiff,*

—v.—

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, SECRETARY OF AGRICULTURE; RICHARD T. LYG, ASSISTANT SECRETARY OF AGRICULTURE; COMMODITY EXCHANGE AUTHORITY; ALEX C. CALDWELL, ACT ADMINISTRATOR, COMMODITY EXCHANGE AUTHORITY; CHARLES E. ROBINSON, DIRECTOR, COMPLIANCE DIVISION, COMMODITY EXCHANGE AUTHORITY; RICHARD E. KIRCHHOFF, DEPUTY DIRECTOR, REGISTRATION AND AUDIT DIVISION, COMMODITY EXCHANGE AUTHORITY; JACK W. BAIN, CHIEF HEARING EXAMINER, UNITED STATES DEPARTMENT OF AGRICULTURE; RICHARD W. DAVIS, JR., COUNSEL, UNITED STATES DEPARTMENT OF AGRICULTURE; T. REED MCMINN, REGIONAL ADMINISTRATOR, NEW YORK REGIONAL OFFICE, COMMODITY EXCHANGE AUTHORITY; CLEMENT GROSS, AUDITOR, COMMODITY EXCHANGE AUTHORITY; MURRAY A. WOLKIS, AUDITOR, COMMODITY EXCHANGE AUTHORITY; EDWARD F. FITZPATRICK, AUDITOR, COMMODITY EXCHANGE AUTHORITY,

*Defendants.*

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RICHARD W. DAVIS, JR., being duly sworn, deposes and says:

1. I am an attorney in the Office of General Counsel, United States Department of Agriculture and a defendant herein. I represent the Secretary of Agriculture

*Affidavit of Richard W. Davis, Jr., sworn to on  
February 11, 1972, in opposition to first  
motion for a preliminary injunction*

in CEA Docket No. 167, the administrative action sought to be enjoined herein, and am familiar with all aspects of the proceedings had in that matter. I have studied the complaint and affidavit of the plaintiff in this action and am familiar with the allegations of fact, conclusions and demands set forth in those documents.

2. This affidavit is made on the basis of personal knowledge as to my own actions, as to the action of Jack W. Bain, Chief Hearing Examiner, in the conduct of the oral hearing in CEA Docket No. 167, and as to the actions of Alex C. Caldwell, Charles E. Robinson, Richard E. Kirchhoff, T. Reed McMinn, Clement Gross, Murray A. Wolkis, and Edward F. Fitzpatrick in the preparation for and conduct of the administrative proceeding in CEA Docket No. 167. The statements in this affidavit regarding matters other than those described above are made on the basis of daily involvement in the legal aspects of the operations of the Commodity Exchange Authority for more than two years, familiarity with the provisions of the Commodity Exchange Act (7 U.S.C. Chapter 1), the rules, regulations and orders of the Commodity Exchange Commission, and the Secretary of Agriculture thereunder and the regulations of the Commodity Exchange Authority, under the Freedom of Information Act (17 CFR Chapter I), and on information and belief. The sources of my information and the grounds for my belief in the truth of the statements so based are documents and communications received by me in my official capacity.

3. An amendment to the Commodity Exchange Act which became effective on June 18, 1968 (Pub. L. 90-258, 82 Stat 28, 7 U.S.C. 6f(2)) authorized the Secretary

*Affidavit of Richard W. Davis, Jr., sworn to on  
February 11, 1972, in opposition to first  
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of Agriculture to prescribe minimum financial requirements to be met by all persons registered as, or seeking registration as, futures commission merchants under the Act. The Secretary published such requirements on January 16, 1969 (34 F.R. 599). The detailed requirements are in 17 CFR 1.17; the related reporting requirements are in 17 CFR 1.10. The Commodity Exchange Authority, on March 19, 1969, sent letters to all registered futures commission merchants which were not subject to the financial requirements of the Chicago Board of Trade or the Chicago Mercantile Exchange, requesting that they file an initial financial statement as of March 31, 1969. Such a letter was sent to Arthur N. Economou and Co., Inc., a futures commission merchant operated and controlled by plaintiff herein. After receipt and review of the statement of plaintiff's firm, and because the validity of some claimed current assets was questioned, the Director of the Registration and Audit Division of the Commodity Exchange Authority, on or about April 21, 1969, directed the regional office in New York to institute an audit to determine the accuracy of the financial statement. Such audits are conducted on a routine basis of all firms which are not subject to the financial requirements of the Chicago Board of Trade and the Chicago Mercantile Exchange. The Secretary has determined that the financial requirements of those exchanges are adequate for the purposes of the Commodity Exchange Act. This audit was conducted, primarily by Edward F. Fitzpatrick, an auditor in the New York office and a defendant herein. As a result of the audit, it was determined that plaintiff's firm failed by nearly \$6,000 to meet the minimum financial requirements. Subsequently, on the basis of other financial statements from

*Affidavit of Pichard W. Davis, Jr., sworn to on  
February 11, 1972, in opposition to first  
motion for a preliminary injunction*

the firm. it was determined that there were continuing deficiencies. On February 19, 1970, a complaint was issued. Ten other complaints, alleging failure to meet minimum financial requirements, have been issued between May 29, 1969, and September 28, 1971. Oral hearing was set for March 31, 1970. After two extensions of time requested by the respondent, respondents answer was filed on April 23, 1970. Because nearly a year had elapsed since the audit, the Office of General Counsel suggested that a further examination be made to determine respondent's current financial condition. This examination was made by Clement Gross, an auditor in the New York office and a defendant herein. It was determined that plaintiff's firm failed by nearly \$25,000 to meet the minimum financial requirements as of March 31, 1970. Consequently, an amended complaint was issued on June 22, 1970, updating the allegations. A hearing was held in New York City on August 5, 6, 7, and 10, 1970, before Jack W. Bain, Chief Hearing Examiner, Department of Agriculture and a defendant herein. I appeared as counsel for the complainant. Edward F. Fitzpatrick, T. Reed McMinn, Richard E. Kirchhoff and Clement Gross, all employees of the Commodity Exchange Authority and defendants herein, presented evidence for the complainant. Suggested findings of fact conclusions of law and order and briefs in support thereof were submitted by both parties with the final submission, by respondent, being filed on March 8, 1971. The hearing examiner filed his recommended decision on August 17, 1971. Respondents filed exceptions to the recommended decision on November 5, 1971, and requested oral argument before the Secretary. Subsequently, respondents requested a 60-day moratorium in the proceedings which

*Affidavit of Richard W. Davis, Jr., sworn to on  
February 11, 1972, in opposition to first  
motion for a preliminary injunction*

was granted by the Judicial Officer on November 30, 1971. That moratorium expired on February 1, 1972. The matter is now pending before the Judicial Officer. A date for oral argument has not been set.

4. Earl L. Butz is the Secretary of Agriculture. He has not been directly involved in any of the actions alleged in the complaint herein.

5. Richard E. Lyng is the Assistant Secretary of Agriculture for Marketing and Consumer Services. His responsibilities include providing general direction for the operations of the Commodity Exchange Authority. His actions in issuing the complaint and the amended complaint in CEA Docket No. 167 and in his conversation and correspondence with plaintiff were entirely within the course of his official duties.

6. Alex C. Caldwell is the Administrator of the Commodity Exchange Authority, United States Department of Agriculture. His responsibilities include the formulation, direction, and supervision of the execution of the policies governing the activities of the Commodity Exchange Authority, and administration and enforcement of the Commodity Exchange Act, the orders and regulations of the Secretary of Agriculture promulgated under the Commodity Exchange Act. He has final authority to issue calls and requests for information in connection with the administration of the Commodity Exchange Act. His actions in causing an investigation to be made of the financial condition of Arthur N. Economou and Co., Inc., a respondent in CEA Docket No. 167, in causing the initiation of the administrative action in CEA Doc-

*Affidavit of Richard W. Davis, Jr., sworn to on  
February 11, 1972, in opposition to first  
motion for a preliminary injunction*

ket No. 167, in his conferences and correspondence with plaintiff regarding that action and regarding the enterprises of plaintiff, in releasing to the press an announcement of the issuance of the complaints in that proceeding, and in causing appropriate employees of the Commodity Exchange Authority to collaborate with me in the preparation and presentation of the government case in CEA Docket No. 167 were entirely within the course of his official duties.

7. Charles E. Robinson is the Director of the Compliance Division of the Commodity Exchange Authority. His responsibilities include providing technical leadership, guidance and review to the national program of compliance investigations of alleged or apparent violations of the Act and regulations and recommends appropriate action when investigations disclose violations. He provides technical assistance to the Office of General Counsel in the preparation of administrative complaints and in review and analysis of evidence for presentation at administrative hearings. He reviews rules and proposed rules of applicants for designation as contract market to determine whether they meet the requirements of the Act and regulations. Based upon such review, he recommends approval or disapproval of the application. His actions in relation to the initiation of the administrative action in CEA Docket No. 167, in his conversations and correspondence with plaintiff regarding that action and regarding the enterprises of plaintiff, in collaborating with me in the preparation of the government case in CEA Docket No. 167 and in furnishing information about plaintiff requested by representatives of the Securities and Exchange Commission were entirely within the course of his official duties.

*Affidavit of Richard W. Davis, Jr., sworn to on  
February 11, 1972, in opposition to first  
motion for a preliminary injunction*

8. Richard E. Kirchhoff is the Deputy Director of the Registration and Audit Division of the Commodity Exchange Authority. The responsibilities of that division include providing technical leadership, guidance and review to the national program of minimum financial requirements for futures commission merchants and to the national program of audits of the books and records of futures commission merchants to assure proper segregation of customers' funds and to determine compliance with minimum financial standards. It analyzes financial reports of futures commission merchants, who are not members of exchanges with approved financial requirements programs, to determine whether they meet minimum financial standards. Mr. Kirchhoff's actions in relation to the initiation of the administrative action in CEA Docket No. 167, in reviewing the financial statements submitted by Arthur N. Economou and Co., Inc., in reviewing the reports of audits of the books and records of that firm, in collaborating with me in the preparation and presentation of the government case in CEA Docket No. 167 and in presenting evidence in the oral hearing in that proceeding were entirely within the course of his official duties.

9. Jack W. Bain is the Chief Hearing Examiner of the United States Department of Agriculture. His function, insofar as the proceeding in CEA Docket No. 167 is concerned, was to act as referee. His responsibilities as referee were to rule upon motions, requests, and objections, set the time and place of hearing, administer oaths to witnesses, admit or exclude evidence, receive evidence, do all acts and take all measures necessary for the maintenance of order and efficient conduct of the

*Affidavit of Richard W. Davis, Jr., sworn to on  
February 11, 1972, in opposition to first  
motion for a preliminary injunction*

proceeding, receive proposed findings of fact, conclusions and orders from the parties and prepare and file his recommended decision. His actions in conducting the proceeding and in preparing and filing his recommended decision were entirely within the course of his official duties.

10. I am an attorney in the Office of General Counsel, United States Department of Agriculture. My responsibilities in connection with disciplinary proceedings such as that in CEA Docket No. 167 are to review investigation reports, prepare complaints and other pleadings instituting disciplinary proceedings, prepare exhibits and interview witnesses in the preparation for trial of such matters, examine and cross-examine witnesses, argue motions and objections in the course of such proceedings, prepare briefs in support of the government case, and prepare and participate in oral argument of such matters before the Secretary of Agriculture. My actions in preparing and presenting the government case in CEA Docket No. 167, in collaboration with various officials and employees of the Commodity Exchange Authority, were entirely within the course of my official duties.

11. T. Reed McMinn is the Director of the Eastern Region of the Commodity Exchange Authority. This region includes the state of New York. His responsibilities include the direction, coordination and conduct of all activities of the Commodity Exchange Authority incident to the administration of the Commodity Exchange Act within the Eastern Region. His actions in causing audits to be made of the books and records of Arthur N. Economou and Co., Inc., in relation to the initiation

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of the administrative action in CEA Docket No. 167, in his conversations and correspondence with plaintiff, in collaborating with me in the preparation and presentation of the government case in CEA Docket No. 167, and in presenting evidence in the oral hearing in that proceeding were entirely within the course of his official duties.

12. Clement Gross and Edward P. Fitzpatrick are auditors in the Commodity Exchange Authority. Their duties are to conduct audits of the books and records of futures commission merchants registered as such under the Commodity Exchange Act in order to assure proper segregation of customers' funds, to determine compliance with minimum financial requirements and to determine compliance with the recordkeeping requirements of the Commodity Exchange Act and the regulations thereunder. Their actions in auditing the books and records of Arthur N. Economou and Co., Inc., in reporting the results of those audits to their supervisors, in collaborating with me in the preparation and presentation of the government case in CEA Docket No. 167, and in presenting evidence in the oral hearing in that proceeding were entirely within the course of their official duties.

13. Murray A. Wolkis is an employee of the Commodity Exchange Authority assigned to the Eastern Region office. From February 25, 1968, to February 21, 1970, he was Chief of the Registration and Audit Branch with responsibilities, at the regional level, similar to those described in paragraph 8 above. From February 22, 1970, to February 20, 1971, he was Chief of the Compliance Branch with responsibilities, at the regional level, similar to those described in paragraph 7 above. From

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February 21, 1971, to date he has been a Senior Auditor with responsibilities similar to those described in paragraph 12 above. His actions in participating in audits of the books and records of Arthur N. Economou and Co., Inc. as supervisor and auditor were entirely within the course of his duties as Chief, Registration and Audit Branch; his actions in collaborating with me in the preparation and presentation of the government case in CEA Docket No. 167 and in his conversations with plaintiff were entirely within the course of his duties as Chief, Registration and Audit Branch and Chief, Compliance Branch.

RICHARD W. DAVIS, JR.  
Attorney, Office of General Counsel

Sworn to before me this  
11th day of February, 1972.  
DONNETTA E. DORSEY

Notary Public  
[Seal] My Commission Expires April 30, 1974.

**Memo Endorsed by MacMahon, D. J., filed January  
5, 1973, denying Economou's second Motion  
for a preliminary injunction**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Pro Se 72 Civ. 478

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ARTHUR N. ECONOMOU,

*Plaintiff,*

—v.—

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,  
*Defendants.*

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Plaintiff, appearing *pro se*, moves pursuant to Rule 65, Fed. R. Civ. P., to enjoin the Secretary of Agriculture, the Commodity Exchange Authority ("CEA") and other governmental officials and agencies from proceeding against him for an alleged willful violation of Commodity Exchange regulations. He admits in his motion papers that he is requesting the exact same relief which we denied him on April 23, 1972. Plaintiff has appealed our decision and requested a stay against the same governmental agencies and officials from the Court of Appeals. The stay was denied but the appeal is still pending.

We denied plaintiff's motion previously on the grounds that he had not exhausted his administrative remedies. He now claims that he has exhausted all administrative remedies and, therefore, is entitled to relief. Assuming that such a reapplication can be made, we must deny it as being without merit. All that has happened since we previously decided plaintiff's motion is that the administrative procedure has progressed one step further. The judicial officer of the Department of Agriculture has

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rendered a tentative decision and order affirming the CEA's hearing examiner's finding that plaintiff violated the Commodity Exchange Act. The decision will become final on January 9, 1973 unless plaintiff files objections by January 8, 1973, almost six months after the tentative decision and order were filed on July 14, 1973. Plaintiff obtained the nearly six months in which to file objections solely because he was previously granted two adjournments of the date on which objections must be filed. All that he actually seeks now is a further adjournment claiming that the judicial officer's failure to permit a further adjournment is evidence of bad faith. This is patently frivolous. Further, once the decision and order become final, plaintiff can immediately appeal them to the Court of Appeals. Plaintiff, therefore, has neither fully exhausted his administrative remedies nor has he availed himself of the appropriate path to judicial review.

Accordingly, we deny plaintiff's motions for a temporary restraining order and a preliminary injunction.

SO ORDERED:

LLOYD F. MACMAHON  
U.S.D.J.

Dated: New York, New York  
January 5, 1973

**Letter from Paul J. Curran, Dated March 4, 1975**

MPB:n  
72-0398

March 4, 1975

Honorable Lloyd F. MacMahon  
United States District Judge  
United States Courthouse  
Foley Square  
New York, New York 10007

Re: *Economou v. Department of Agriculture, et al.*  
72 Civ. 478

Dear Judge MacMahon:

This status report was requested by your Court Clerk. The above action was held in suspense pending the outcome of Mr. Economou's appeal of the Department of Agriculture's decision to sanction him and his commodities firm. Although his appeal was successful (a copy of the Second Circuit's Opinion is attached), Mr. Economou has shown no interest in continuing the above action in the year since the Court of Appeals' decision. Under the circumstances, a dismissal for lack of prosecution would seem appropriate.

Very truly yours,

PAUL J. CURRAN  
United States Attorney

By: MEL P. BARKAN  
Assistant United States Attorney  
Assistant Chief, Civil Division  
Telephone No.: (212) 791-0052

Enclosure

cc: Arthur N. Economou  
286 Fifth Avenue  
New York, New York 10001

# AFFIDAVIT OF MAILING

CA 75-6050

State of New York ) ss  
County of New York )

Pauline P. Troia, being duly sworn,  
deposes and says that he is employed in the Office of the  
United States Attorney for the Southern District of New York.

That on the 30th day of  
Sept 19 75 she served a copy of the within  
govt's brief on appeal  
by placing the same in a properly postpaid franked envelope  
addressed:

David C. Buxbaum, Esq.,  
111 Broadway  
Suite 510  
NY NY 10006

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline P. Trovi

Sworn to before me this

30th **day** of Sept 1975

Ralph Lee

**RALPH I. LEE**  
**Notary Public, State of New York**  
**No. 41-2292838 Queens County**  
**Term Expires March 30, 1977**